

## DOUBLE JEOPARDY: PROMISE OR POLTERGEIST?

The Court of Appeals for Cuyahoga County, Ohio recently decided important issues of criminal and constitutional law in the case of *State v. Fletcher*.<sup>1</sup> The court was called upon to decide whether the double jeopardy clause in the fifth amendment of the United States Constitution was applicable to the states through the due process clause of the fourteenth amendment. If these double jeopardy provisions were considered applicable to the states with regard to prosecutions in the federal jurisdictions, the further question was raised whether the prohibition against state action barred successive prosecutions in the state jurisdictions. The *Fletcher* court was also required to interpret section 10, article 1 of the Ohio Constitution to state whether Ohio law prohibited second state prosecutions for the claimed criminal acts which induced a prior prosecution in the federal jurisdiction.

The *Fletcher* court through Judge Day responded to the aforementioned issues affirmatively, based upon an extension of *Benton v. Maryland*<sup>2</sup> and a reappraisal of *Bartkus v. Illinois*<sup>3</sup> and *Abbate v. United States*.<sup>4</sup> What was basically at issue in *Fletcher* was whether one Michael Fletcher and one Willie Walker could be prosecuted and punished by the state of Ohio for the same claimed criminal acts<sup>5</sup> which supported charges pressed to a conclusion against them in the federal jurisdiction for the Northern District of Ohio. This note will examine the legitimacy of the court's conclusions and explore in some detail the major double jeopardy cases decided in the United States and the precedents on which they were based. Some alternative suggestions will also be presented as possible solutions to the problems raised in the application of double jeopardy protection.

### I. INTRODUCTION

The language of the fifth amendment<sup>6</sup> seems at first blush to set

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<sup>1</sup> 22 Ohio App. 2d 83 (1970).

<sup>2</sup> 395 U.S. 784 (1969).

<sup>3</sup> 359 U.S. 121 (1959).

<sup>4</sup> 359 U.S. 187 (1959).

<sup>5</sup> On February 2, 1967, defendant Fletcher was indicted by the Cuyahoga County Grand Jury for robbery of a financial institution, with a count for the unlawful entry. Also on February 2, 1967, defendant Fletcher and defendant Walker were jointly indicted for robbery of a financial institution, with a count for the unlawful entry. On January 27, 1967, defendant Fletcher was charged by information on two counts for violations of Title 18, Section 2113 (a) and (c), U.S. Code. The two counts charged (1) the armed robbery of a savings and loan association whose deposits were insured by the Federal Savings and Loan Insurance Corporation, and (2) the receipt and concealment of money stolen from a bank whose deposits were insured by the Federal Deposit Insurance Corporation. On February 8, 1967, defendant Walker was charged by the indictment of a Federal Grand Jury with the violation of Title 18, Section 2113 (a), U.S. Code.

<sup>6</sup> *State v. Fletcher*, 15 Ohio Misc. 336 (1968), "Wherever the phrases 'double jeopardy' or

forth a rather lucid conclusion unincumbered with arcane meanings. But its message has been variously interpreted in such a fashion as to deny its simplistic impression. It has been suggested by some that the structure against double jeopardy had its origin in the Old Testament: "He will make a full end; He will not take vengeance twice on his foes."<sup>7</sup> There is also authority to suggest that the early Greek and Roman laws contained proscriptive principles on double jeopardy.<sup>8</sup> And in the eighteenth century Blackstone stated:

First, the plea of *autrefois acquit* (or a formal acquittal), is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.<sup>9</sup>

So, at the English common law, the plea of *autrefois convict* or *autrefois acquit* would have been a good plea in bar to a present prosecution if a prior prosecution was for the same offense.<sup>10</sup> Reflecting this same principle the Court in *Ex Parte Lange*,<sup>11</sup> stated:

The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.<sup>12</sup>

Simply stated, once a defendant is acquitted or convicted of crime for his conduct in a particular set of circumstances he should be able to consider the matter closed and plan his life ahead without the threat of subsequent prosecution and possible imprisonment for the same conduct.<sup>13</sup>

Generally speaking, the basic policy behind the double jeopardy protection is the avoidance of multiple prosecution and multiple punishment for the same offense. These two considerations represent distinct policy questions, the former being basically a procedural consideration and the latter essentially a substantive law consideration. Problems began to erupt in the development of the common law of double jeopardy when a distinction was drawn between an "act" and an "offense". Under the early

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'successive prosecutions' are used, they are assumed to mean one prosecution followed by another, both flowing from the same act, with the essential difference between the two proceedings being the 'sovereignty,' i.e., state or federal, under whose auspice the charge is laid."

<sup>7</sup> 1 *Nabum* 9.

<sup>8</sup> J. SIGLER, *DOUBLE JEOPARDY*, 2, (1969).

<sup>9</sup> 4 BLACKSTONE, *COMMENTARIES* \* 335 (1899).

<sup>10</sup> See 2 BLACKSTONE, *COMMENTARIES* § 378-379 (Jones Ed. 1916).

<sup>11</sup> 85 U.S. (18 Wall.) 163 (1873).

<sup>12</sup> *Id.* at 169.

<sup>13</sup> Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 *YALE L.J.* 389 (1956).

English common law there was a single count charged in the indictment for which there was either an acquittal or a single punishment.<sup>14</sup> But with the advent of the multiple count indictment the problem of multiple punishment for the same act began to appear.

Historically, the development of the notion that multiple prosecutions were a particularly pernicious practice to be avoided was spurred by the fact that criminal penalties were extremely harsh. It was correctly observed that the government should have but one attempt to muster its resources to establish the guilt of the defendant with regard to a particular act he was alleged to have committed.

The reason normally advanced for protecting against multiple punishment is that otherwise no rule of law can be established. A prospective defendant should know that there are certain standards and limitations by which he will be judged and not an arbitrary system tempered only by the whim and caprice of judges.

Having glanced briefly at the policy behind the double jeopardy protection, some introductory observations are pertinent to question whether a rule allowing successive federal-state prosecutions for the same act is consistent with the policies behind the double jeopardy protection. A great deal of litigation has occurred in these United States in which an attempt to resolve the dilemma of how to define "same offense" has taken place. Various tests have been advanced to provide guidelines, including the "same evidence"<sup>15</sup> test and a variation of that test, the "same transaction" test.<sup>16</sup> A test that has also received a great deal of attention is the one announced in the old English case of *Rex v. Vandercomb and Abbott*,<sup>17</sup> where the Court stated:

[T]hat unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second.<sup>18</sup>

The policy has esoterically developed, however, that the tests, as imprecise as they might be, to determine whether a defendant is being tried twice for the same offense are abandoned as being inapplicable when violations of the statutes of the state and federal governments are involved. The type of double jeopardy to which a defendant is exposed as a result of successive prosecutions by two sovereigns for the same offense has been somehow viewed as an exception to the normal policy. But it would seem that the exception is unwarranted. If society has been

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<sup>14</sup> Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus v. Illinois and Abbate v. United States*, 14 CASE W. RES. L. REV. 700, 712 (1963) [hereinafter cited as Pontikes, *Dual Sovereignty and Double Jeopardy*].

<sup>15</sup> See *Morgan v. Devine*, 237 U.S. 632, 639 (1915).

<sup>16</sup> *Spannell v. State*, 83 Tex. Crim. 418, 203 S.W. 357 (1918).

<sup>17</sup> 2 Leach C.C. 708 (1796).

<sup>18</sup> *Id.* at 720.

injured but once, any offenses connected with that one injury are identical. That is, if indictments charge the same act and the same intent they charge the same crime.<sup>19</sup>

If the focus of the double jeopardy structure were solely directed toward the interests of individual defendants, many of the problems that have cropped up in litigation in the United States might easily be absent. But the fact that our system of government is a federal system has caused the peculiar development that a defendant may be subjected to successive trials in the state and federal jurisdictions for the same act or offense. The concept that allows such successive trials has been yclept "dual sovereignty." This theory was definitively stated in *Moore v. Illinois*:<sup>20</sup>

Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both.<sup>21</sup>

The underlying theory of dual sovereignty is that because the laws of two sovereigns are involved, the same act produces two offenses so that a second prosecution does not put the defendant in jeopardy for the "same offense."

## II. DEVELOPMENT OF THE LAW

In 1959 the Supreme Court decided *Bartkus* and *Abbate*, the former allowing a state prosecution after a federal acquittal for the same alleged criminal act and the latter upholding a federal prosecution after the defendants had plead guilty to the same criminal act in Illinois state court and received sentences of three months' imprisonment each. Before these decisions are scrutinized, however, an analysis of *United States v. Lanza*<sup>22</sup> is necessary since *Bartkus* relied in great measure on *Lanza*, and *Abbate* refused to overrule *Lanza*. Commenting on the Court's refusal to overrule *Lanza*, Mr. Justice Brennan stated for the majority in *Abbate*:

No consideration or persuasive reason not presented to the Court in the prior cases is advanced why we should depart from its firmly established principles. On the contrary, undesirable consequences would follow if *Lanza* were overruled. The basic dilemma was recognized over a century ago in *Fox v. Ohio*.<sup>23</sup> As was there pointed out, if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered.<sup>24</sup>

<sup>19</sup> Note, *Double Jeopardy and the Concept of Identity of Offenses*, 7 BROOKLYN L. REV. 79, 87 (1938).

<sup>20</sup> 55 U.S. (14 How.) 13 (1852).

<sup>21</sup> *Id.* at 19.

<sup>22</sup> 260 U.S. 377 (1922).

<sup>23</sup> 46 U.S. (5 How.) 410 (1847).

<sup>24</sup> *Abbate v. United States*, 359 U.S. 187, 195 (1959).

In *Lanza* the defendants were charged with manufacturing, transporting and possessing intoxicating liquor in violation of the Volstead Act. The defendants claimed that the prosecution was barred by a prior prosecution under a Washington statute for manufacturing, transporting and possessing intoxicating liquor. The defendants argued that the second prosecution was in violation of the double jeopardy clause of the fifth amendment. But Chief Justice Taft, writing for the majority of the Court, held that the fifth amendment was inapplicable because the state and federal governments were two sovereigns and two offenses were involved even though the acts were identical in all other aspects.<sup>25</sup> Stating his conclusion Chief Justice Taft revealed:

But it is not for us to discuss the wisdom of legislation it is enough for us to hold that, in the absence of special provision by Congress, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts.<sup>26</sup>

It has been suggested by some writers that the precedent on which *Lanza* was based was weak and not in point for the proposition advanced in *Lanza*.<sup>27</sup> That authority began with the *Fox* case in 1847 which held that the state of Ohio might punish the passing of counterfeit money as a private cheat on the citizens of Ohio without colliding with the exclusive federal power to punish the actual counterfeiting.<sup>28</sup> There were actually two distinguishable offenses involved in *Fox* but the Court in dictum went on to state that *even if* the offenses were the same, each government would have the right to prosecute and punish independently for the same crime. Thus the Court implicitly announced a dual sovereignty rationale without a proper case for such a pronouncement before the Court.

In *United States v. Marigold*,<sup>29</sup> the defendant challenged the right of Congress to punish the circulation of counterfeit currency as distinct from its manufacture. The Court, however, distinguished *Fox* and held that Congress did have the power to punish circulation on the basis of its right to regulate currency. Since the issue in *Marigold* was whether Congress could punish the circulation of counterfeit money and not successive prosecutions the Court's statement of the right of the state and federal governments to prosecute where the same act violates a statute of each without one prosecution barring the other<sup>30</sup> must be considered dictum.

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<sup>25</sup> *United States v. Lanza*, 260 U.S. 377, 382 (1922).

<sup>26</sup> *Id.* at 385.

<sup>27</sup> Pontikes, *Dual Sovereignty and Double Jeopardy*, *supra* Note 14, at 700.

<sup>28</sup> U.S. CONST. Art. I, § 8, cl. 6. "To provide for the Punishment of counterfeiting the Securities and current Coin of the United States."

<sup>29</sup> 50 U.S. (9 How.) 560 (1850).

<sup>30</sup> *Id.* at 569.

In *Moore v. Illinois*,<sup>31</sup> the validity of an Illinois law against the harboring of fugitive slaves was drawn into question since Congress had already spoken in this area. Though the question of successive prosecutions was not involved, when the issue of double jeopardy was raised the Court's answer came in terms of dual sovereignty. The Court stated that there were two offenses because the same act violated the law of two sovereigns.<sup>32</sup>

In *United States v. Cruikshank*,<sup>33</sup> also relied on in part by *Lanza*, the sufficiency of a complaint under the Civil Rights Act was involved and the discussion of dual sovereignty was merely superficially relevant.

*Ex Parte Siebold*,<sup>34</sup> involved the constitutionality of a federal statute controlling election procedure. The states also had statutes controlling election procedure and since the federal statute was upheld by the Court the argument was advanced that there was a possibility of double punishment for violation of both state and federal election laws. The Court answered that when one act violates the statutes of two sovereigns, there are two separate offenses and cited the dicta in *Fox*, *Marigold*, *Cruikshank* and *Moore*.

In *Cross v. North Carolina*,<sup>35</sup> the defendant was prosecuted for circulating a false note. The defendant challenged the jurisdiction of the state court on the ground that he had violated a federal statute which outlawed making false entries on the books of national banks. The Court, however, found that two separate offenses were involved and upheld jurisdiction. But the discussion in the case stated that there were two offenses in any event since the act violated the laws of two sovereigns. This was dictum since there was no discussion in the opinion regarding successive prosecutions.

*Pettibone v. United States*,<sup>36</sup> was a case where the defendants were charged with conspiring to obstruct the administration of a federal court. The dual sovereignty theory was discussed only tangentially since the Court found that the conspiracy alleged in the indictment did not violate both state and federal statutes.

The first case in which the dual sovereignty theory was necessary to the decision was *Crossley v. California*.<sup>37</sup> The defendant was convicted in California for causing the death of an engineer by derailling a train. An appeal was based on the ground that since the train carried mail exclusively, California had no jurisdiction. The Court rejected defendant's argument

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<sup>31</sup> 55 U.S. (14 How.) 12 (1852).

<sup>32</sup> *Id.* at 20.

<sup>33</sup> 92 U.S. 542 (1875).

<sup>34</sup> 100 U.S. 371 (1879).

<sup>35</sup> 132 U.S. 131 (1889).

<sup>36</sup> 148 U.S. 197 (1893).

<sup>37</sup> 168 U.S. 640 (1898).

by stating that because the state and federal governments were separate sovereigns, each could punish an act which was an offense under its law. However, the basic issue was whether California could punish an act which was punishable by federal statute—not successive prosecutions.

In *Southern Ry. v. Railroad Commissioner*,<sup>38</sup> the defendant was charged with a violation of the Indiana Safety Appliance Act for failure to provide safety equipment on its railroad cars. This case did deal with successive federal-state prosecutions for the same offense since the defendant had been previously convicted under the Federal Safety Appliances Act for the same omissions. But double prosecution was *not* allowed since the Court found that Congress had preempted the field under the interstate commerce clause. The cases announcing the dual sovereignty theory were distinguished on the ground that in those cases the state had concurrent jurisdiction.

In *Gilbert v. Minnesota*,<sup>39</sup> the defendant challenged the constitutionality of a Minnesota statute which outlawed advocating against conscription on the ground that regulation of the Army was exclusively vested in Congress. The Court found that the purpose of the statute to build up the Army and inspire patriotism was a valid one and forecasted no possibility of conflict between the state and federal governments. The Court discussed dual sovereignty only in support of its basic argument. The possibility of successive prosecutions was not mentioned.

The last case to be cited by *Lanza* was *McKalvey v. United States*,<sup>40</sup> in which the defendants were charged with the federal offense of obstructing free passage over lands owned by the United States. The defendants argued that the statute encroached on the police power of the state and was therefore unconstitutional. But the Court replied that the state offense involved would be one of personal violence, a crime quite different from the obstruction of free passage.<sup>41</sup> Although the Court did discuss the dual sovereignty theory and expressed the opinion that the same act may be an offense against both sovereigns,<sup>42</sup> that was not the issue and successive prosecutions were not involved. So, a trip through *Lanza's* questionable past reveals that its birth was less than a legitimate one and also casts doubt on its progeny, *Bartkus* and *Abbate*.

The latter opinions both cited as precedent the decision in *Screws v. United States*,<sup>43</sup> which can also be shown to be unsuitable as precedent for the propositions advanced in *Bartkus* and *Abbate*. Sheriff Screws was charged with beating to death a Negro prisoner in his custody and under

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<sup>38</sup> 236 U.S. 439 (1915).

<sup>39</sup> 254 U.S. 325 (1920).

<sup>40</sup> 260 U.S. 353 (1922).

<sup>41</sup> *Id.* at 358.

<sup>42</sup> *Id.* at 358-359.

<sup>43</sup> 325 U.S. 91 (1945).

Georgia law would presumably have been guilty of murder. But Screws was prosecuted by the federal authorities under the Civil Rights Act.<sup>44</sup> Both the federal and state laws in this case have separate and distinct policy considerations. The Georgia law was of course, designed to protect the taking of life; the Federal statute was calculated to prevent one acting as a representative of the state's police power from depriving the Negro defendant of certain rights guaranteed by the Constitution or laws of the United States. It happened to be coincidental that Screw's act of beating to death a Negro prisoner transgressed the letter and policy of both the federal and state statutes. The fact was that Screws did in fact commit two distinguishable offenses. The dual sovereignty theory need not have been resorted to in *Screws* to justify two prosecutions for the same act. Furthermore, the Court in *Abbate* and *Bartkus* need not have been unduly concerned about the state and federal government barring prosecutions by each other unless the dual sovereignty theory were applied.

A closer look at *Bartkus* and *Abbate* is now required. In *Bartkus* the petitioner was tried in the Federal District Court for the Northern District of Illinois for robbery of a federally insured savings and loan association.<sup>45</sup> The case was tried to a jury and Bartkus was acquitted. Approximately three weeks hence the defendant was indicted by an Illinois grand jury. The Illinois indictment recited substantially the same facts contained in the federal indictment but charged Bartkus for violating an Illinois robbery statute.<sup>46</sup> Bartkus was tried and convicted in the Criminal Court of Cook County and was sentenced to life imprisonment under the Illinois Habitual Criminal Statute.<sup>47</sup> Bartkus' plea of *autrefois acquit* was rejected by both the trial court and the Illinois Supreme Court. Speaking for the majority of the court in affirming Bartkus' conviction, Mr. Justice Frankfurter reported:

We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such. The relevant historical materials have been canvassed by this Court and by legal scholars. These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a shorthand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States.<sup>48</sup>

Mr. Justice Frankfurter seemed to lay great stress on the fact that the constitutions of the states who ratified the fourteenth amendment and the states

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<sup>44</sup> 18 U.S.C. § 242 (1948).

<sup>45</sup> 18 U.S.C. § 2113 (1948).

<sup>46</sup> ILL. REV. STAT, ch. 38, § 501 (1919).

<sup>47</sup> ILL. REV. STAT, ch. 38, § 602 (1883).

<sup>48</sup> *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959).



who entered the union after the ratification had provisions obviously different from the requirements of the Bill of Rights—in particular the fifth, sixth and seventh amendments which Mr. Justice Frankfurter used as an illustration. In the case of each new admission the Court noted that either the President of the United States or the Congress or both found that the entering state's constitution was in conformity with the Enabling Act<sup>49</sup> and the Constitution of the United States.<sup>50</sup> The Court further observed that there was no warrant to believe that the states in adopting constitutions with the specific purpose of complying with the requisites of admission were in fact wading the demands of the Constitution of the United States.<sup>51</sup> The Court then stated:

Surely this compels the conclusion that Congress and the States have always believed that the Due Process Clause brought into play a basis of restrictions upon the states other than the undisclosed incorporation of the original eight amendments.<sup>52</sup>

The latter language of course aligns with the reasoning of the Court in *Palko v. Connecticut*,<sup>53</sup> that categorically resisted the notion of a wholesale incorporation of the first eight amendments into the due process clause of the fourteenth amendment.

After noting that twenty-seven of the twenty-eight states which had considered the validity of successive state and federal prosecutions as against a challenge of violation of either a state double jeopardy provision or a common law evidentiary rule of *autrefois acquit* or *autrefois convict* had refused to rule that the second prosecution was or would be barred, the Court in *Bartkus* concluded:

With this body of precedent as irrefutable evidence that state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense, it would be in disregard of a long, unbroken, unquestioned course of impressive adjudication for the Court now to rule that due process compels such a bar.<sup>54</sup>

The Court therefore could not find within the four corners of the Constitution sufficient reason to prohibit successive federal-state prosecutions even though the net effect of such prosecutions is substantially the same as successive federal prosecutions for the same offense, insofar as the defendant is concerned. This result was seized upon by Mr. Justice Black in dissent who concluded in effect that individual rights had been sacrificed upon the

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<sup>49</sup> 37 Stat. 1728 (1912).

<sup>50</sup> *Bartkus v. Illinois*, 359 U.S. 121, 126 (1959).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 302 U.S. 319 (1937).

<sup>54</sup> *Bartkus v. Illinois*, 359 U.S. 121, 136 (1959).

altar of "federalism." Mr. Justice Black's view was made abundantly clear thusly:

The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of the State and Federal governments is brought to bear on one man in two trials, than when one of these 'Sovereigns' proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct.<sup>55</sup>

Mr. Justice Black's position in *Bartkus* could be predicted as he moved farther away from his confidence in the *Palko* decision. That Mr. Justice Black was less than enthusiastic about *Palko* was aptly indicated in his dissenting opinion in *Adamson v. California*.<sup>56</sup>

If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining*<sup>57</sup> rule applying none of them, I would choose the *Palko* selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all of the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.<sup>58</sup>

I have taken the liberty of going to some length to present the position of Mr. Justice Black regarding the incorporation of the first eight amendments of the Bill of Rights into the due process clause of the fourteenth amendment since the recent trend of the Court has been to reject *Palko's* restrictiveness by incorporating all of the protections of the Bill of Rights directed at criminal proceedings. The trend began in 1961 when the fourth amendment protection from unreasonable searches and seizures was applied to the states through the due process clause of the fourteenth amendment.<sup>59</sup> The following protections of the Bill of Rights have been subsequently applied to the states: protection from cruel and unusual punishment;<sup>60</sup> right to counsel at trial;<sup>61</sup> right to counsel during interrogation;<sup>62</sup> freedom from compelled self-incrimination;<sup>63</sup> freedom from com-

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<sup>55</sup> *Id.* at 155 (Black, J., dissenting).

<sup>56</sup> 332 U.S. 46 (1947).

<sup>57</sup> *Twining v. New Jersey*, 211 U.S. 78 (1908).

<sup>58</sup> 332 U.S. 46, 89 (1947).

<sup>59</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>60</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>61</sup> *Gideon v. Wainwright*, 372 U.S. 355 (1963).

<sup>62</sup> *Escobedo v. Illinois*, 378 U.S. 478 (1964).

<sup>63</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964).

ment on defendant's failure to testify;<sup>64</sup> right to confront witnesses;<sup>65</sup> the right to jury trial on a serious criminal offense;<sup>66</sup> and the protection against double jeopardy.<sup>67</sup>

Before proceeding to the decision in *Benton v. Maryland*<sup>68</sup> that has applied the double jeopardy protection to the states, some reflection on the *Abbate* decision is necessary. The defendants in *Abbate* were indicted by the state of Illinois for violating an Illinois statute making it a crime to conspire to injure or destroy the property of another.<sup>69</sup> The defendants entered pleas of guilty to the indictment and were each sentenced to three months' imprisonment. Thereafter indictments were returned in the United States District Court for the Southern District of Mississippi against the defendants charging "the offense of violating 18 U.S.C. § 371 by conspiring to destroy, contrary to 18 U.S.C. § 1362 certain works, property and material known as coaxial repeater stations and micro wave towers . . . operated and controlled by the United States."<sup>70</sup> The defendants were found guilty. In the majority opinion authored by Mr. Justice Brennan, who dissented in *Bartkus* based upon a belief that the state prosecution was in actuality a second federal prosecution, the Court in *Abbate* affirmed the conviction of the defendants. The reasoning in *Abbate* pursued similar lines as that in *Bartkus* with the apprehension expressed that were the decision to be otherwise federal law enforcement might be fettered. The *Bartkus* Court felt there was a danger of federal interference with the enforcement of state law—particularly in the area of civil rights.

### III. NEW DIRECTIONS

The strength and vitality of *Bartkus* and *Abbate* have been substantially affected by the Court's 1969 decision in *Benton*, though the Court declined to overrule either decision. The defendant was tried in a Maryland state court for burglary and larceny but convicted only of burglary and sentenced to ten years in prison. Because the grand and petit juries in the defendant's case had been selected under an invalid constitutional provision the case was remanded to the trial court and the defendant was given, and exercised, the option of demanding reindictment and retrial. The defendant was reindicted for larceny and burglary and he filed a motion to dismiss the larceny count on the ground of former jeopardy. The court denied the motion and on retrial Benton was found guilty of both crimes and concurrently sentenced to fifteen years for burglary and five years for

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<sup>64</sup> *Griffin v. California*, 380 U.S. 609 (1965).

<sup>65</sup> *Pointer v. Texas*, 380 U.S. 400 (1965).

<sup>66</sup> *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>67</sup> *Benton v. Maryland*, 395 U.S. 784 (1969); *See also* 15 VILL. L. REV. 233, 235 (1965).

<sup>68</sup> 395 U.S. 784 (1969).

<sup>69</sup> ILL. REV. STAT., ch. 38, § 139 (1919).

<sup>70</sup> *Abbate v. United States*, 359 U.S. 187, 188-189 (1959).

larceny. The appellate court ruled against petitioner on the issue of double jeopardy and affirmed the conviction. The Supreme Court then considered two very important issues relative to the applicability of the double jeopardy clause of the fifth amendment to the states through the fourteenth amendment. Concomitantly, the Court considered the question of whether the petitioner was twice put in jeopardy. In answering both of the aforementioned in the affirmative the Court overruled *Palko* as far as it was inconsistent with the *Benton* holding. The Court stated:

[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment.<sup>71</sup>

The Court seemed to rely heavily on the recent trend established by the line of cases from *Mapp v. Ohio*<sup>72</sup> through *Duncan v. Louisiana*<sup>73</sup> as standing for the proposition that the "[C]ourt has 'increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law'."<sup>74</sup> On the other hand the Court compared *Palko* to several cases that had been overruled in the wake of the trend toward looking to the Bill of Rights to measure the propriety of state action in criminal trials. The Court stated:

Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of 'fundamental fairness.'<sup>75</sup>

The Court analogized the double jeopardy protection to the right to trial by jury on a serious criminal offense which the *Duncan* decision had found to be "fundamental to the American scheme of justice"<sup>76</sup> and held that the double jeopardy protection was also clearly fundamental as well.<sup>77</sup> That being so, the Court concluded:

Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice' . . . the same constitutional standards apply against both State and Federal Governments.<sup>78</sup>

The *Benton* Court was more favorably inclined to accept that the Anglo Saxon common law has visited upon us the view that double jeopardy is a basic right whether the protection is asserted in a state or federal forum. The *Bartkus* Court seemed to suggest in footnote 9 that some of the En-

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<sup>71</sup> *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

<sup>72</sup> 367 U.S. 643 (1961).

<sup>73</sup> 391 U.S. 145 (1968).

<sup>74</sup> *Benton v. Maryland*, 395 U.S. 784, 794 (1959).

<sup>75</sup> *Id.* at 795.

<sup>76</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

<sup>77</sup> *Benton v. Maryland*, 395 U.S. 784, 796 (1969).

<sup>78</sup> *Id.* at 795.

glish precedent relative to double jeopardy could not be legitimately relied upon or applied in a federal system. The Court's view was stated thusly:

It has not been deemed relevant to discussion of our problem to consider dubious English precedents concerning the effect of foreign criminal judgments on the ability of English Courts to try charges arising out of the same conduct—dubious in part because of the confused and inadequate reporting of the case on which much is based. . . . Such precedents are dubious also because they reflect a power of discretion vested in English judges not relevant to the constitutional law of our federalism.<sup>79</sup>

So, again the concept of federalism seems to be the justification to which the Court returns to allow successive prosecutions of a defendant for the same offense. What is it then that inheres in federalism that compels such ersatz justice? Some would argue that were it not for the Court's refusal to bar second prosecutions by the state or federal government that many instances would arise where a defendant might receive a lighter punishment than he "deserved," that forum shopping would occur and that the "interest" of the barred forum would be undercut. However, I would concede that even if these anxieties were justified, it is indeed a peculiar justice that permits an individual to be harassed and *his* interests sacrificed due to speculation that the institutional system might be exposed to some hardship—and in some instances perhaps fail to get its "pound of flesh." If federal government is to be "the sublime conception of a nation in which every citizen lives under two complete and well-rounded systems of laws . . . moving one within the other noiselessly and without friction,"<sup>80</sup> then some less truculent reconciliation of government and individual liberty is required. Successive prosecutions for a single act, even though by distinct sovereignties, each acting under its own laws, would certainly seem to violate both the principles of the common law, and the genius of our free government.<sup>81</sup>

The *Benton* decision provided a partial answer to the double jeopardy dilemma by applying the double jeopardy stricture of the fifth amendment to the states through the due process clause of the fourteenth amendment. But *Benton* did not reach the question "whether the federal proscription against double jeopardy prevents a state prosecution following a federal acquittal or conviction."<sup>82</sup> The *Fletcher* decision recognized that the *Benton* rule reached the issue of prior jeopardy in one jurisdiction as a bar to a later prosecution in a second jurisdiction only by implication.<sup>83</sup> But the Court believed that the implications of *Benton* were enough to deprive both *Abbate* and *Bartkus* of any future force. The Court commented:

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<sup>79</sup> *Bartkus v. Illinois*, 359 U.S. 121, 128 N. 9. (1959).

<sup>80</sup> J. FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY* 301 (4th Ed. 1889).

<sup>81</sup> *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 72 (1820) (Story, J., dissenting).

<sup>82</sup> *State v. Fletcher*, 22 Ohio App. 2d 83, 87 (1970).

<sup>83</sup> *Id.* at 92.

"[c]ertainly the principle of *Abbate* mounts no constitutional mandate binding state courts *not* to treat a prior federal jeopardy as a bar to subsequent criminal proceedings by the states."<sup>84</sup> The *Fletcher* court, seemingly feeling that it had been cast into the role of soothsayer by the *Benton* implications estimated that the Supreme Court would eventually overrule *Bartkus* and *Abbate* since the reasoning propounded in *Benton* to proscribe successive "state on state" jeopardy was equally applicable to other successive jeopardies "where the singular distinction between the causes stems from the jurisdiction in which the first action is begun."<sup>85</sup> The Court further justified its prediction on the ground that *Palko* had been overruled by *Benton*, thereby further weakening *Bartkus* and *Abbate*. The court therefore concluded that:

[I]t is incompatible with fundamental justice that a person who has been charged with crime be exposed to jeopardy for the same act first in the federal system and then a second time in the courts of this state. This is so whether "Due Process" in the Fourteenth Amendment encompasses the double jeopardy provisions of the Fifth Amendment or not. For the double menace from the single act is 'repugnant to the conscience of mankind.'<sup>86</sup>

The court then addressed itself to a consideration of the former jeopardy issue under Section 10, Article I of the Ohio Constitution. After reviewing some of the cases decided in Ohio that were thought to be in point on the issue of dual sovereignty and double jeopardy,<sup>87</sup> the Court determined that these cases were inapplicable and moreover that the dual sovereignty issue was one of first impression in Ohio—save for the policy outlined in The Ohio Constitution: "No person shall be twice put in jeopardy for the same offense."<sup>88</sup> In determining that this language should be conclusively interpreted to state in behalf of Ohio that successive federal-state prosecutions would not be allowed the Court responded:

The evils that policy was meant to proscribe are not improved because the state and federal sovereignties combine to generate them. It would be incongruous to allow a basic constitutional policy of a state, determined as an aspect of its sovereignty, to be frustrated by a consequence of the duality which allows that sovereignty to exist. Furthermore, it would be both inconsistent and ironic to use that federalism, which is justified in the name of protecting freedom, to obliterate a fundamental right.<sup>89</sup>

Whether the Ohio court is correct in its expectation that were the Court to reconsider *Bartkus* and *Abbate* they would fall in the wake of

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 93.

<sup>86</sup> *Id.* at 94.

<sup>87</sup> See *Koch v. State*, 53 Ohio St. 433 (1895); *State v. Shimman*, 122 Ohio St. 522 (1930).

<sup>88</sup> OHIO CONST. Art I, § 10.

<sup>89</sup> *Fletcher v. State*, 22 Ohio App. 2d 83, 99 (1970).

*Benton* will have to remain to be seen. I would contend that federalism *ought* to be a resilient enough governmental concept that proper administration of justice within its framework does not depend on placing an individual in jeopardy more than once for the same offense. If statutes of both the state and federal governments are based on substantially the same policy, in a given circumstance, a single act is violative of a single policy, and thereby can constitute only one offense. It seems irrational and unnecessary to attempt to distinguish two policies which are otherwise substantially similar merely on the basis of different sovereigns. "Even if it can be said that each sovereign has a different 'interest' ["]if the policies of both statutes are substantially similar, what is the difference between the "interest" of one sovereign and that of the other?"<sup>90</sup> Following this line of reasoning one might easily arrive at the conclusion that the *Fletcher* court was correct in its resolution of the issues before it since the statutory policy of each jurisdiction there was substantially similar. Without resorting to subtle niceties one can also conclude that the defendants in *Bartkus* and *Abbate* should have had to only be exposed to jeopardy once since the state and federal statutes in each case were designed to prevent in great measure the same act.

The argument here presented on behalf of the notion that the dual sovereignty theory ought to be abandoned as a justification for successive prosecutions will proceed on the assumption that in point of fact substantially the same offense is involved. When one focuses away from the "interests" of government in successive prosecutions it becomes rather more clear that an individual defendant whose resources cannot match those which the government might marshal against him should be able to concentrate his resources in one trial to establish his freedom from guilt. Otherwise, a defendant may be subjected to substantial mental anguish, embarrassment and expense, all of which can only serve to harass the defendant and in fact punish him. I do not think our substantive criminal law or the society it is designed to protect are well served by a system that allows such legal harassment. "Multiple trials also increase the possibility of convicting an innocent man, and the threat of further prosecution makes it difficult for an acquitted defendant to resume his role in society."<sup>91</sup> It is germane to note again at this point that it makes not a scintilla of difference to a particular defendant, in terms of his interest, whether the successive trials take place in the same forum or different forums. It is the fact of having been exposed to jeopardy twice for the same act that is objected to—period.

The primary responsibility for the administration of criminal law nor-

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<sup>90</sup> Pontikes, *Dual Sovereignty and Double Jeopardy*, *supra* Note 14, at 713.

<sup>91</sup> Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1540 (1967).

mally rests with the individual states. The federal criminal law is aimed at supplementing state law in areas where federal investigative resources can best aid the states and where the criminal activity sought to be proscribed is apt to be interstate.<sup>92</sup> And in these areas there is no substantial evidence to lead to the conclusion that the state will be lethargic in obtaining convictions if successive prosecutions are prohibited.

On the other hand, there has been a rather strong indication that national interests do not generally require federal prosecution after a state trial. After the *Abbate* decision the United States Attorney General issued a release declaring that no federal prosecution would follow a state trial for the same act except in unusual circumstances and then only with his express approval.<sup>93</sup> In stating such a policy the Attorney General merely gave present expression to an anticipation announced some one hundred twenty-seven years ago in *Fox v. Ohio*:

It is almost certain, that, in the benignant spirit in which the institutions, both of the State and federal system are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.<sup>94</sup>

If there are areas of conflict and lack of cooperation in the areas of concurrent criminal jurisdiction there should be concentrated efforts to eliminate their occurrence and not a tendency to let such instances be responsible for overall policy.

There are actually four competing considerations operating in the double jeopardy imbroglio: the individual, the state government, the federal government and the communities right to effective law enforcement.<sup>95</sup> There have been several solutions offered to accommodate interests. One possible solution that has been advanced is that statutes be enacted which would bar prosecutions after a prior conviction or acquittal in another jurisdiction. For example, the New York statute reads as follows:

When an act charged as a crime is within the jurisdiction of another state, territory or country, as well as within the jurisdiction of this state, a conviction or acquittal thereof in the former, is a bar to a prosecution or indictment therefor in this state.<sup>96</sup>

Mr. Justice Frankfurter alluded to the statutory solution and the New York statute specifically in *Bartkus*: "Finally, experience such as that of New York may give aid to Congress in its consideration of adoption of

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<sup>92</sup> *Id.* at 1551.

<sup>93</sup> 27 U.S.L.W. 2509 (1959).

<sup>94</sup> 46 U.S. (5 How.) 410, 434 (1847).

<sup>95</sup> See Note, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 S. CAL. L. REV. 252, 265 (1961).

<sup>96</sup> N.Y. CODE CRIM. PROC. tit. I, § 139 (1958).



similar provisions in individual federal criminal statutes or in the federal criminal code."<sup>97</sup>

Another rather unique innovation that has been suggested to solve the dual sovereignty problem is that of a joint trial.<sup>98</sup> Herein the trial would be conducted by both the federal law and state governments. The responsibility would be on defendant's counsel to give notice of the action against his client to other jurisdictions, state or federal, which would have a right to prosecute. The second jurisdiction would be subsequently barred from instituting an action if they did not indicate their intention so to do. If both jurisdictions decided in favor of prosecutions a joint trial would be held and the greater of the two possibilities of punishment would provide the maximum measure which could be inflicted. Trial would be held in the court system of the jurisdiction where the prosecution was initially instituted. This procedure would also have the ancillary benefit of alleviating the prospect of forum shopping.

Since it is unlikely that a case will be placed before the Court in the relatively near future that will present a fact situation having the characteristics necessary to permit a holding that will establish clear guidelines for double jeopardy protection, the legislature should act without undue delay. A statute that would prescribe what matters of law and fact should be presented in one proceeding would be extremely helpful. The statute should also prescribe that in cases of possible conflict between the federal and state authorities with respect to what substantive law is to be enforced that the United States Attorney or his representative confer with the state officials to decide what course of action would best promote the interest of society. To facilitate a conference of the type suggested the statute might list considerations that should be taken into account in deciding whether an act has characteristics of a federal or state violation.

#### IV. CONCLUSION

Whatever solutions are adopted to accommodate the interests of all concerned at some future indeterminate time it is felt that the *Fletcher* decision is the right beginning—although the case rests primarily on a pre-cognitive notion of what the Supreme Court may do. This nation *can* operate efficiently in the administration of criminal law without subjecting a defendant to the judicial machinery of both state and federal governments, and will in fact do so once the judiciary soundly denounces the dual sovereignty justification for depriving individual defendants of the right to be free of successive prosecutions.

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<sup>97</sup> *Bartkus v. Illinois*, 359 U.S. 121, 139 (1959).

<sup>98</sup> Note, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 S. CAL. L. REV. 252, 266 (1961).

It is hoped that the Court will one day soon answer the following with a resounding "negative":

Shall we fritter away our liberties upon a metaphysical subtlety, two sovereignties?<sup>99</sup>

It is time to recognize that justice under our federal system of government can be achieved without placing a defendant between Scylla and Charybdis.

*Stephen Warren King*

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<sup>99</sup> Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1331 (1932).